

1  
2  
3  
4 ERIC WICKHAM,

5 Plaintiff,

6 v.

7 SCHENKER, INC.,

8 Defendant.

9 Case No. 23-cv-00946-PCP

10  
11 **ORDER DENYING MOTION TO  
12 TRANSFER**

13 In this nationwide class action, plaintiff Eric M. Wickham alleges that the defendant  
14 Schenker, Inc. violated the Fair Credit Reporting Act and California law by failing to provide  
15 proper disclosures and obtain proper authorization prior to conducting credit and background  
16 checks on prospective employees. Before the Court is Schenker's motion to transfer this matter to  
17 the Eastern District of Virginia under 28 U.S.C. § 1404(a). For the following reasons, the Court  
18 concludes that Schenker has failed to demonstrate that the convenience of parties and witnesses  
19 and the interest of justice favor transfer. The Court therefore denies Schenker's motion.

20 **BACKGROUND**

21 Mr. Wickham is a resident of San Bernadino County, California. He seeks to represent a  
22 class of current, former, and prospective Schenker employees who applied for employment for  
23 which a background check was performed. Schenker is a corporation organized under the laws of  
24 New York with its principal place of business in Chesapeake, Virginia.

25 Mr. Wickham was employed by Schenker to work in its Ontario, California facility in  
26 February 2019. Before Mr. Wickham started his employment, Schenker performed a background  
27 investigation on him. Mr. Wickham alleges that he would not have authorized Schenker to  
28 conduct the background investigation had he not been confused by extraneous and superfluous

1 language included in Schenker's disclosure forms.

2 The present motion is the second motion to transfer venue filed in this case. In November  
3 2019, a different plaintiff (Michelle Orpilla) commenced this action in state court. Schenker  
4 removed the action to this Court, after which Ms. Orpilla filed a motion to remand and Schenker  
5 filed a motion to transfer venue to the Eastern District of Virginia. In May 2020, this Court  
6 granted the plaintiff's motion and remanded the case because Ms. Orpilla lacked Article III  
7 standing. *See Orpilla v. Schenker, Inc.*, No. 19-CV-08392-BLF, 2020 WL 2395002, at \*5 (N.D.  
8 Cal. May 12, 2020). In August 2021, Mr. Wickham replaced Ms. Orpilla as the representative  
9 plaintiff and filed a first amended complaint. The parties then engaged in discovery and motion  
10 practice before the state court. In early 2023, Mr. Wickham filed a second amended complaint  
11 after which Schenker again removed the case to federal court. In July 2023, Schenker filed the  
12 present motion to transfer venue to the Eastern District of Virginia.

### 13 **LEGAL STANDARD**

14 Under 28 U.S.C. § 1404(a), “[f]or the convenience of parties and witnesses, in the interest  
15 of justice, a district court may transfer any civil action to any other district or division where it  
16 might have been brought or to any district or division to which all parties have consented.” An  
17 action “might have been brought” in any court that has subject matter jurisdiction over the claims  
18 and personal jurisdiction over the defendant, and where venue would have been proper. *See Doe v.*  
19 *Epic Games, Inc.*, 435 F. Supp. 3d 1024, 1040 (N.D. Cal. 2020). The party seeking to transfer a  
20 case bears the burden of demonstrating that the convenience and interest of justice factors “clearly  
21 favor transfer.” *Lax v. Toyota Motor Corp.*, 65 F. Supp. 3d 772, 781 (N.D. Cal. 2014). A “motion  
22 to transfer venue under § 1404(a) requires the court to weigh multiple factors in its determination  
23 whether transfer is appropriate in a particular case.” *Jones v. GNC Franchising, Inc.*, 211 F.3d  
24 495, 498 (9th Cir. 2000). The Ninth Circuit has identified several factors to guide that inquiry: “(1)  
25 the location where the relevant agreements were negotiated and executed, (2) the state that is most  
26 familiar with the governing law, (3) the plaintiff’s choice of forum, (4) the respective parties’  
27 contacts with the forum, (5) the contacts relating to the plaintiff’s cause of action in the chosen  
28 forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of

1 compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of  
2 access to sources of proof.” *Id.* at 498–99. District courts retain “broad discretion to adjudicate  
3 motions for transfer on a case-by-case basis” and as such no individual factor is dispositive. *Ctr.*  
4 *for Biological Diversity & Kempthorne*, No. C08-1339CW, 2008 WL 4543043, at \*2 (N.D. Cal.  
5 Oct. 10, 2008). Transfer is not appropriate if it “merely shift[s] rather than eliminate[s] the  
6 inconvenience.” *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.  
7 1986).

## 8 ANALYSIS

### 9 I. The Court Takes Judicial Notice of Three Exhibits.

10 In support of his opposition to Schenker’s motion, Mr. Wickham asks this court to take  
11 judicial notice of three exhibits: (1) Southwest Airlines Co.’s Notice of Motion and Memorandum  
12 of Points and Authorities in Support of Its Motion to Transfer Venue, *Lewis v. Southwest Airlines*  
13 *Co.*, No. 16-cv-00749-JCS (N.D. Cal. March 18, 2016); (2) Defendant’s Motion for Judgment on  
14 the Pleadings and Supporting Brief, *Lewis v. Southwest Airlines Co.*, No. 3:16-cv-01538-M (N.D.  
15 Tex. July 13, 2016); and (3) Declaration of CJ Beutler in Support of Defendant’s Motion for  
16 Judgment on the Pleadings, *Lewis v. Southwest Airlines Co.*, No. 3:16-cv-01538-M (N.D. Tex.  
17 July 13, 2016).

18 Under Federal Rule of Evidence 201(b), a court may take judicial notice of a fact “not  
19 subject to reasonable dispute” because it either (1) “is generally known within the trial court’s  
20 territorial jurisdiction” or (2) “can be accurately and readily determined from sources whose  
21 accuracy cannot reasonably be questioned.” A court cannot, however, take judicial notice of a fact  
22 that is “subject to reasonable dispute.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.  
23 2001).

24 Here, neither party disputes the authenticity of these documents. For that reason, the Court  
25 will take judicial notice of these exhibits. But to the extent the exhibits are irrelevant to the issues  
26 currently before the Court, they will not be considered in ruling upon Schenker’s motion.

1       **II. Waiver Under Rule 12(h) Does Not Apply to Schenker's Motion To Transfer Venue.**

2                  As a threshold matter, the parties dispute whether Schenker has waived its right to transfer  
3                  venue. Relying on *Sandy v. McClure*, Mr. Wickham argues that Schenker has waived its right to  
4                  transfer venue. No. 08-3052 SC, 2008 WL 4830727 (N.D. Cal. Nov. 6, 2008). In that case the  
5                  Court found that convenience weighed in favor of transfer but held that the defendants, “by filing  
6                  their Answer before filing the instant Motion, waived the defense of improper venue” under Rule  
7                  12(b)(3). Schenker argues that Mr. Wickham’s waiver argument based on *Sandy* is misplaced and  
8                  cites to other district court cases that criticize *Sandy* for failing to distinguish between a motion to  
9                  transfer venue under 28 U.S.C. § 1404(a) and a motion for improper venue under Rule 12(b)(3).  
10                 See *Turnage v. Old Dominion Freight Line, Inc.*, No. C 13-1409 PJH, 2013 WL 2950836, at \*5  
11                 (N.D. Cal. June 14, 2013); *Sam Kholi Enters., Inc. v. Comsys Servs. LLC*, No. 11-CV-970 W  
12                 (NLS), 2011 WL 13257533, at \*3 n.5 (S.D. Cal. Oct. 3, 2011).

13                 Schenker is correct. A party waives a defense to improper venue under Rule 12(h)(1)(B)  
14                 by failing to include it in responsive pleadings. Before the Court, however, is a motion to transfer  
15                 venue under 28 U.S.C. § 1404(a), not a motion to dismiss for improper venue under Rule 12(b)(3).  
16                 Schenker is not asserting a defense but rather arguing that convenience and justice weigh in favor  
17                 of transfer. Schenker’s argument is not dependent on a finding that the Northern District of  
18                 California is improper and Schenker does not make that argument here. See *Atl. Marine Const. Co.*  
19                 *v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 59 (2013) (holding that § 1404(a) “does not  
20                 condition transfer on the initial forum’s being ‘wrong’”). Accordingly, Schenker has not waived  
21                 its argument for transfer pursuant 28 U.S.C. § 1404(a).

22        **III. Convenience and the Interest of Justice Do Not Favor Transfer to the Eastern District  
23                 of Virginia.**

24                 Schenker is correct that this action could have been brought in the Eastern District of  
25                 Virginia under 28 U.S.C. § 1404(a). The Court nonetheless declines to transfer this case to that  
26                 District because the majority of convenience factors and the interest of justice do not favor  
27                 transfer.  
28

1           **A.     The Action Could Have Been Brought in the Eastern District of Virginia.**

2           As an initial matter, transfer is available only if this action could have been brought in the  
3           District to which Schenker seeks transfer. An action “might have been brought” in any court that  
4           has subject matter jurisdiction over the claims and personal jurisdiction over the defendant and  
5           where venue would have been proper. *See Epic Games*, 435 F. Supp. 3d at 1040. Applying this  
6           test, it is clear that this action could have been brought in the Eastern District of Virginia.

7           First, the Eastern District of Virginia would have subject matter jurisdiction over this  
8           matter for the same reasons this Court has jurisdiction.

9           Second, the Eastern District of Virginia can exercise general jurisdiction over Schenker.  
10          “With respect to a corporation, the place of incorporation and principal place of business are  
11          ‘paradig[m] ... bases for general jurisdiction.’” *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)  
12          (citation omitted). It is undisputed that Schenker’s principal place of business is in Chesapeake,  
13          Virginia, which is located in the Eastern District of Virginia. Dkt. No. 28, at 7; Dkt. No. 1-7, at 9.

14          Third, venue is proper in the Eastern District of Virginia. Venue is proper in “a judicial  
15          district in which any defendant resides, if all defendants are residents of the State in which the  
16          district is located,” 28 U.S.C. § 1391(b)(1), or in “a judicial district in which a substantial part of  
17          the events or omissions giving rise to the claim occurred,” 28 U.S.C. § 1391(b)(2). For purposes of  
18          venue in a State with more than one judicial district, a corporation “shall be deemed to reside in  
19          any district in that State within which its contacts would be sufficient to subject it to personal  
20          jurisdiction if that district were a separate State.” 28 U.S.C. § 1391(d). Venue would have been  
21          proper in the Eastern District of Virginia both because Schenker resides in the Eastern District of  
22          Virginia (which covers Chesapeake, Virginia) and because a “substantial part of events or  
23          omissions giving rise to the claim” occurred there.

24          As such, this action might have been brought in the Eastern District of Virginia.

25           **B.     Mr. Wickham’s Choice of Forum and the Northern District’s Connection to  
26           the Action Weigh Against Transfer.**

27          The parties dispute whether Mr. Wickham’s choice of the Northern District of California  
28          weighs against transfer. Normally, a plaintiff’s choice of forum is entitled to “substantial weight.”

1       See *Fitbit, Inc. v. Koninklijke Philips N.V.*, 336 F.R.D. 574, 588 (N.D. Cal. 2020) (quoting  
2       *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)). “The degree to which courts  
3       defer to the plaintiff’s chosen venue is substantially reduced where the plaintiff does not reside in  
4       the venue or where the forum lacks a significant connection to the activities alleged in the  
5       complaint.” *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001) (citation  
6       omitted)). Additionally, the Ninth Circuit has held that “when an individual brings a derivative  
7       suit or represents a class, the named plaintiff’s choice of forum is given less weight.” *Lou v.  
8       Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). Although a plaintiff’s chosen forum “is entitled to  
9       only minimal consideration” where “the operative facts have not occurred within the forum and  
10      the forum has no interest in the parties or subject matter,” courts in this district have still given  
11      weight to the plaintiff’s choice of forum in class actions where the parties have sufficient  
12      connection to the district. See, e.g., *Rafton v. Rydex Series Funds*, No. C 10-1171 CRB, 2010 WL  
13      2629579, at \*3 (N.D. Cal. June 29, 2010) (“[E]ven though this is a class action, Plaintiff and  
14      Defendants have sufficient connections to this District to warrant giving Plaintiff’s choice of  
15      forum significant weight.”); *Wade v. Indus. Funding Corp.*, No. C-92-0343-RFP, 1992 WL  
16      207926, at \*3 (N.D. Cal. May 28, 1992) (declining to disregard the plaintiffs’ choice of forum in a  
17      securities class action where there were significant contacts with that forum).

18           Schenker argues that Mr. Wickham’s choice of forum should not be given any deference  
19       because this is a nationwide class action that has no connection to the Northern District of  
20       California. Mr. Wickham argues that both he and Schenker have significant connections with the  
21       State of California and the Northern District. Mr. Wickham emphasizes that he is a resident of  
22       Ontario, California and was a California employee of the defendant. He asserts that he was  
23       therefore entitled to sue in any county in the state under Cal. Civ. Proc. Code § 395(a). Further, he  
24       argues that the California FCRA class members have contacts with California and it is likely that  
25       California is “the state where the second-most number of pre-employment background check  
26       screening[s] are conducted.” Dkt. No. 34, at 8.

27           The Court agrees with Mr. Wickham that his choice of forum should be given some weight  
28       despite this being a nationwide class action in a district where the representative plaintiff does not

1 reside. Because Schenker employs 86 employees and maintains two locations in the Northern  
2 District of California, the District has an interest in this action. *See* Dkt. No. 34, at 6, 9 n.4. Mr.  
3 Wickham's choice of forum thus weighs modestly against transferring this case to the Eastern  
4 District of Virginia.

5 **C. Schenker Has Failed To Establish that the Convenience of the Parties and  
6 Witnesses Favor Transfer.**

7 The parties dispute whether the convenience of the parties and witnesses favors transfer of  
8 this case to the Eastern District of Virginia. Schenker argues that Virginia is more convenient  
9 because Schenker is headquartered there and Virginia is the “situs of material events pertaining to  
10 Schenker’s processes for screening candidates and background checks;” because “the vast  
11 majority of personnel with responsibility over Schenker’s pre-employment background program  
12 work in Virginia;” and because Virginia is more convenient for the majority of witnesses and  
13 sources of proof—including Schenker’s background check policy, relevant disclosure forms, and  
14 contracts with background check vendors—are more accessible from Virginia. Dkt. No. 28, at 8–  
15 10, 12. Schenker claims that “*every* Schenker ER employee with current access to the databases  
16 containing the relevant information necessary for analysis of Plaintiff’s FCRA claims and  
17 Schenker’s defenses thereto, lives on the east coast or closer to Virginia, with none in California.”  
18 *Id.* at 10. Further, Schenker argues that Virginia is more convenient for more potential class  
19 members, 65.85% of whom live in the “eastern region,” as compared to only 14.98% in the  
20 western region. *Id.* at 11.

21 By contrast, Mr. Wickham argues that California is the situs of events because his  
22 background check disclosure forms were executed in California. Further, Mr. Wickham challenges  
23 the notion that Virginia is more convenient for the majority of class members on the grounds that  
24 Schenker’s statistic that 65.85% of Schenker’s employee’s work in the eastern region “does not  
25 provide the actual number of background checks conducted in each state.” In addition, Mr.  
26 Wickham argues that any inconvenience to Virginia-based witnesses can be mitigated by  
27 conducting depositions in Virginia or remotely. Similarly, he argues that the source of physical  
28 evidence is not a substantial factor where it can be copied or shared electronically.

1           Mr. Wickham's arguments are more convincing. Virginia may be more convenient for  
2 Schenker, some potential witnesses, and access to physical evidence. At the same time, however,  
3 Virginia would be a significantly *more* inconvenient forum for Mr. Wickham, who would have to  
4 fly across the country to attend any court proceedings rather than taking a short in-state flight,  
5 train, or car ride. Further, Mr. Wickham has offered to depose witnesses in Virginia or remotely  
6 for the convenience of those witnesses. In addition, the relevant documents can presumably be  
7 copied or shared electronically, rendering the physical location of the sources of proof less  
8 important. The primary inconvenience to Schenker is travel time and expense, but Schenker has  
9 already retained local counsel in California and Ohio and transferring the case at this juncture  
10 would merely shift that burden to the plaintiffs. *See Decker*, 805 F.2d at 843 (declining to transfer  
11 where “transfer would merely shift rather than eliminate the inconvenience”). In short, Schenker  
12 has failed to establish that the inconveniences it might face in litigating this case in the Northern  
13 District of California are particularly consequential, or that they outweigh the significant  
14 inconveniences Mr. Wickham would face litigating in the Eastern District of Virginia.

15           The remaining factors likewise fail to strongly favor transfer. This Court is just as familiar  
16 with the relevant federal law as courts in the Eastern District of Virginia, and is arguably more  
17 familiar with the California state law issues presented. This District's interest in protecting citizens  
18 from violations of the Fair Credit Reporting Act is identical to that of the Eastern District of  
19 Virginia. And neither party argues that the availability of process for unwilling witnesses is a  
20 relevant factor here.

21           In sum, the main factor weighing in favor of transfer is that the Eastern District of Virginia  
22 would be somewhat more convenient for Schenker and some of its potential witnesses. The Court  
23 finds, however, that the possible inconvenience that Schenker and its potential witnesses may  
24 suffer by continuing to litigate this case in California is not sufficiently strong to overcome the  
25 weight given to Mr. Wickham's choice of forum, the inconvenience to him of the proposed  
26 alternate forum, and the interests of justice that weigh against transferring this case to the Eastern  
27 District of Virginia four years after this suit commenced and after substantial discovery and  
28 motions practice has already occurred in California courts.

## CONCLUSION

For the foregoing reasons, Schenker's motion to transfer venue is denied.

## **IT IS SO ORDERED.**

Dated: January 10, 2024

D. May Jr.

P. Casey Pitts  
United States District Judge

United States District Court  
Northern District of California